86-652

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF MARYLAND,

Petitioner,

v.

STEVEN LAMONT CLARK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Where Respondent Clark and co-defendant Hemphill were each represented by separate counsel, and where each elected to exercise his 20 peremptory challenges independently, instead of pooling them for a total of 40, did the trial judge deprive Respondent Clark of his Sixth Amendment right to the effective assistance of counsel, when he told defense counsel they could not confer with each other during the exercise of peremptory challenges?

2. Even if, assuming arguendo, the trial judge's order interfered with the defense of Respondent's case, did the Court of Appeals of Maryland err in holding that prejudice must automatically be presumed in this case since the interference did not prevent counsel from conferring with and assisting Respondent during jury selection?

3. Even if, assuming arguendo, there was constitutional error, because state interference with the effective assistance of counsel is presumed

prejudicial, was the error harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)?

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OPINION OF THE COURT BELOW

The unreported opinion of the Court of Special Appeals of Maryland in Steven Lamont Clark v. State of Maryland, (No. 1701, September Term, 1983, filed

October 11, 1984) affirming Respondent's conviction is reproduced in the Appendix (pp.19-25).

The reported opinion of the Court of Appeals of Maryland in Clark v. State, 306 Md. 483, __ A.2d __ (1986), reversing Respondent's conviction is reproduced in the Appendix (pp.1-18).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's conviction was filed June 26, 1986. Petitioner, the State of Maryland, filed a Motion for Reconsideration on July 28, 1986, which was denied by the Court of Appeals of Maryland on August 21, 1986. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

> been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTE*

Maryland Code, Courts & Judicial Proceedings

Article: §8-301. Peremptory Challenges (1984)

Rules*

Maryland Rules of Procedure:

Rule 4-313. Peremptory Challenges

Former Rule 713. Peremptory Challenges

Rule 811. Writ of Certiorari

Rule 812. Petition - Times for Filing

Rule 813. Scope of Review

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*Relevant statutes and Rules have been reproduced in their entirety in the Appendix (pp.28-33).

STATEMENT OF THE CASE

Respondent, Steven Lamont Clark, was charged on January 11, 1983 by Indictment No. 18301104 in the Circuit Court for Baltimore City with possession of heroin with intent to distribute and related offenses. Jonathan Hemphill, was charged by Indictment No. 18301105 with the same narcotics violations.

Prior to trial on June 13, 1983, the co-defendants, Respondent Clark and Hemphill, by their respective attorneys, Joseph F. Lyons, and Richard Karceski,[1] each moved for severance of their trials. Both motions were denied by the Honorable George B. Rasin.[2]

Selection of the jury commenced with the voir dire examination. Among other things, the prospective jurors were asked if they were related to any of the lawyers or if they had ever been a client of any of the

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[1]Both counsel were privately retained.

[2]Judge Rasin was a visiting judge. He is not assigned to the Circuit Court for Baltimore City.

lawyers. Judge Rasin excused several prospective jurors for cause sua sponte. Both defendants requested Judge Rasin to strike for cause, prospective juror no. 228, a police officer who knew two of the police witnesses in the case. Their request was granted and Judge Rasin struck that juror for cause. There were no other defense challenges for cause.

The State of Maryland, however, challenged two prospective jurors. Over defense objection, the trial court granted the first challenge because prospective juror no. 126 had a relative who had been incarcerated on a narcotics offense. However, after objection, Judge Rasin refused to strike for cause prospective juror no. 220, a former secretary of Respondent's counsel, Joseph Lyons.

After these challenges for cause, the following colloquy occurred:

> "THE COURT: Are you going to pool your challenges or each one exercise individually?
>
> MR. KARCESKI, [Counsel for Hemphill]: We each have 20

challenges. I am only saying I don't want to do anything at this point to upset the system or to cause an unnecessary delay, but if we are going to have a problem, I just don't know whether we take a chance and go with it now or hope it works out. If it doesn't and we come up short, I think the court is well aware under the Dean case, we have created a tremendous monster and the only way to rectify it is to begin again. I don't want to commit myself, and I know the court is not asking us to do it, but I don't want to commit myself to a certain number of challenges. We have 20, and I will do the best I can under the situation.

THE COURT: Okay. I will ask each defendant's attorney to exercise his challenges and I will keep score on it. I just asked, are you going to consult with one another and pool and have 40 between you or each one exercise independently?

MR. KARCESKI: I think we will exercise our independent right to challenge.

THE COURT: Then don't confer with one another during the selection. Do it independently. You cannot.

MR. KARCESKI: I don't think there is anything that forbids us from speaking —

THE COURT: I am instructing you, you get 20 challenges, and you get 20 challenges. Let's not play this game of saying you will exercise it independently, but yet you want to confer on it.

MR. KARCESKI: I note my objection. I will note my inability to comment on the court's ruling at this point.

THE COURT: Go ahead.

MR. LYONS, [Counsel for Clark]: I take exception to it.

* * * * *

THE COURT: This is the first time I have been in trial where the defense counsel haven't agreed to — perfectly all right to confer together, but you all didn't want to do that. I don't see what difference it makes. You had 20 challenges, and you could confer. It doesn't make any difference whether he takes 30 and you take 10 or not. you each insisted on the 20, and if you do that, you will bite the spike —

MR. KARCESKI: Your Honor —

THE COURT: I am not going to argue about it.

MR. KARCESKI: The reason why I take 20 or we pool it, if I exhaust my challenges, I may have certain remedies in the appellate court that I

> don't have if I don't exhaust all my challenges. So, suppose we took 38, who are we to say we exhausted the challenges when it comes to whatever argument is left, and if the court rules, I think we did make an exception early on about a challenge for cause — maybe something else that escapes me for the moment. So, I think each defendant is entitled to 20, and that is why I requested it on behalf of Mr. Hemphill. And I continue my request for mistrial, Your Honor.
>
> THE COURT: I will deny your request, both of you."

At that point, the peremptory challenges were exercised, and the jurors were selected, sworn and duly impaneled.

At the conclusion of the trial on June 16, 1983, the jury found Respondent Clark guilty of the second count, possession of heroin, and hung on the other three counts. Judge Rasin declared a mistrial as to the first, third and fourth counts.[3] On July 29, 1983, Judge Rasin sentenced Respondent to a three year

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[3]Co-defendant Hemphill was acquitted on all counts.

term of imprisonment in the Department of Correction with all but one year suspended. Upon his release, Respondent was to be placed on three years supervised probation and pay a fine of $500.00 and court costs. In addition, he was to be evaluated and have therapy for any drug problem.

Respondent filed a direct appeal in the Court of Special Appeals of Maryland. He only raised one issue: that the trial judge had erred in refusing to allow communication between counsel for the defendants during the exercise of their peremptory challenges. In an unreported per curiam opinion the Court of Special Appeals affirmed Respondent's conviction (Apx. 19-25). The court held that the trial judge did not err in refusing to allow counsel for Respondent and a co-defendant to consult during the exercise of their peremptory challenges and thus did not deny Respondent due process of law. The court explained:

> "Appellant asserts that the court's direction denying defense counsel the

> opportunity to consult with each other impaired his right to challenge. This was clearly not the case. The trial judge gave counsel the opportunity to pool their challenges and consult regarding the total 40 challenges. Counsel chose the tactical alternative of independently challenging jury panelists. Counsel for Clark excepted to the court's ruling, but made no issue of the fact that the decision by Hemphill's counsel deprived him of a choice. They wanted to ensure that they individually took 20 strikes to preserve the record for appellate review. There is no showing by appellant of prejudice." (Apx.21-22).

The court further noted that Respondent's right to exercise his 20 peremptory challenges was not denied or impaired in any way under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) and emphasized that it would not allow Respondent "to have his cake and eat it too" (Apx.24).

With the assistance of the Office of the Public Defender, Respondent filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland in which he raised the single issue: "May a trial judge forbid communication between counsel for co-

defendants?" Respondent attacked the decision of the Court of Special Appeals since it allowed the trial judge to abuse its discretion by ignoring "both the Maryland rules and principles of due process and fundamental fairness."

Petitioner, State of Maryland, filed an Answer to Respondent's Petition for Writ of Certiorari. The State argued that Petitioner had failed to demonstrate, let alone allege, any "concrete element of prejudice which occurred to him in the jury selection process".

On February 7, 1985, the Court of Appeals granted Respondent's Petition for Writ of Certiorari. On June 26, 1986, the Court reversed Respondent's conviction explaining that Judge Rasin had denied Respondent's right to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution, a ground which had never been raised by Respondent. The court observed:

> "...effective representation means representation in which the attorney

> is unhindered in the lawful pursuit for knowledge which might benefit the client. The trial judge's ruling here in effect tied counsel's hands and foreclosed him from pursuing a valuable source of information in a consolidated trial — the co-defendant's attorney. The State disagrees, arguing that the defendant has no right to the effective assistance of his co-defendant's counsel. The point is, however, that the trial judge's action adversely impacted upon the effectiveness of the defendant's attorney by placing an impediment on his assistance." (Apx.12) (Emphasis in original).

Therefore, the court found that the proscription upon communication not only stymied Respondent's attorney's judgment as to trial strategy, but also impaired his ability to make a considered judgment as to "when to exercise the defendant's peremptory challenges." (Apx.13). In addition, the court found that the judge's order "placed an impediment upon counsel's judgment in determining whether to object to the State's jury challenges" an error which becomes "especially acute" in light of the decision in Batson v.

Kentucky, ___ U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Apx.14).

The court held that prejudice would be presumed (Apx.18) and refused to consider whether the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1969), because, the State had "failed to file a cross-petition alleging harmless error as an issue" (Apx.17).

Petitioner filed a Motion for Reconsideration and Stay of Mandate on July 28, 1986 which was denied on August 21, 1986 (Apx.26-28).

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland has decided an important question of federal law involving the Sixth Amendment right to the effective assistance of counsel, that has not yet been, but should be settled by

this Court.[4] Futhermore, it has decided this federal question in a novel way which not only conflicts with state and federal decisions, but with applicable decisions of this Court.

This Court has repeatedly emphasized that a defendant in a criminal case is entitled to a fair trial, not a perfect one. Federal and state courts have uniformly recognized the wide discretion given to trial judges regarding the exercise of peremptory challenges. Moreover, both have consistently rejected previous contentions that a defendant is entitled to the assistance of more than one counsel at trial. The exercise of peremptory challenges is a privilege in

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[4]Although the Maryland court referred to Article 21 of the Maryland Declaration of Rights, which parallels the Sixth Amendment, the court observed that the federal and state constitutional provisions were in pari materia (Apx. 9). Thus, the court's opinion was based on an interpretation of the Sixth Amendment and not on an independent state ground. Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

state and federal courts and not a right secured by the United States Constitution.

Nevertheless, the Maryland Court of Appeals has elevated a minor ruling by the trial judge into an error of constitutional magnitude despite the lack of any actual prejudice to the defendant as a result of that ruling. There is a big difference between that which is desired by an attorney in the conduct of a defense and that which is necessary. In its haste to condemn the trial court's action, the Maryland court has confused those rulings which it does not approve with the requirements of the United States Constitution.

In Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), this Court emphasized that not every restriction on defense counsel's strategy is a violation of the Sixth Amendment. The Maryland Court's novel decision is not only unwarranted and unsupported in American case law, but it establishes an alarming precedent that is likely to be followed by

other courts and extended further. Consequently, review of this important Sixth Amendment issue is necessary.

Review is also necessary to clarify whether prejudice is automatically to be presumed in all cases involving trial court "interference" with the defense of a case or whether the burden is on the defendant to demonstrate actual prejudice. In Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), this Court stated that prejudice would be presumed in all cases of "state interference with counsel's assistance." In United States v. Cronic, 466 U.S. 648, 659, n.25, 104 S.Ct. 2039, 2047 n.25, 80 L.Ed.2d 657 (1984), this Court stated that prejudice had only been presumed when "counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding." The language in both of these cases was dicta, since they involved denial of effective assistance of counsel because of the incompetence of the defendants' trial attorneys.

Review is necessary to clarify whether prejudice is presumed whenever there is state "interference" with counsel's conduct of the defense or whether it is only to be presumed when counsel has been totally absent or prevented from rendering assistance.

Review is also necessary to determine whether the trial court's "interference" with the defense strategy here, if constitutional error, was nevertheless harmless beyond a reasonable doubt, an issue of federal law which has not previously been considered by this Court.

ARGUMENT

I.

THE TRIAL COURT DID NOT PREVENT RESPONDENT CLARK FROM RECEIVING THE EFFECTIVE ASSISTANCE OF COUNSEL IN A JOINT TRIAL, WHEN IT PROHIBITED DEFENSE COUNSEL FROM CONFERRING DURING THE EXERCISE OF PEREMPTORY CHALLENGES.

The Sixth Amendment guarantees to the accused in all criminal prosecutions the right to the

"Assistance of Counsel."[5] This right to counsel is the right to the "effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

On four occasions, this Court has held that trial court actions which interfere with the ability of counsel to conduct the defense had deprived a defendant of his constitutional right to the effective assistance of counsel.

In Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), a Georgia statute which allowed a criminal defendant to make an unsworn statement to the jury, but denied counsel the right to question the defendant on direct examination, was held to be inconsistent with the Fourteenth Amendment. In Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32

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[5]This fundamental right was extended to defendants in state criminal prosecutions through the Fourteenth Amendment in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

L.Ed.2d 358 (1972), a Tennessee statute that required a defendant who desired to testify to do so before any other defense witness testified, was held to be an impermissible restriction on the defendant's right against self-incrimination as well as an infringement on the defendant's Fourteenth Amendment right to due process of law. Justice Brennan explained:

> "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense - particularly counsel - in the planning of its case." 406 U.S. at 612-13, 92 S.Ct. at 1895, 32 L.Ed.2d at 364.

Since the State had not made a claim that this was harmless error under Chapman v. California, supra, Brooks' conviction was reversed and the case remanded for a new trial.

In Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the trial judge, in accordance with a New York statute, prevented

counsel for the accused from giving a closing argument in a non-jury trial. In reversing Herring's conviction, Justice Stewart explained that the decisions in Ferguson v. Georgia, supra, and Brooks v. Tennessee, supra, demonstrated that:

> "....the right to the assistance of counsel has thus been given a meaning 'that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary fact finding process.'" 422 U.S. at 858, 95 S.Ct. at 2553, 45 L.Ed.2d at 598.

In Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), this Court held, for the first time, that a discretionary ruling by a trial judge had interfered with the defendant's Sixth Amendment constitutional right to the effective assistance of counsel. The federal district court had ordered the defendant not to discuss the case at all during an overnight recess with anyone, even his attorney. The Fifth Circuit Court of Appeals affirmed Geders' conviction because he failed to claim any prejudice resulting from his inability to consult with counsel

during one evening of the trial. However, this Court held that the order preventing Geders from consulting his counsel "about anything" during the 17 hour overnight recess between his direct and cross-examination "impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." 425 U.S. at 91, 96 S.Ct. at 1337, 47 L.Ed.2d at 601.

The Maryland Court of Appeals based its holdings on these four decisions. However, the court overlooked the fact that on two occasions since Geders v. United States was decided, this Court has refused to reverse a defendant's conviction upon a claim that the trial court interfered with his Sixth Amendment right to the effective assistance of counsel.

In Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) the defendant claimed that a state trial judge who gave a cautionary instruction that the jury was not to draw any adverse inference from the defendant's decision not to testify violated his Fifth Amendment privilege against compelled self-

incrimination, and also deprived him of his Sixth Amendment right to the effective assistance of counsel because it interfered with his attorney's trial strategy to avoid any mention that the defendant had not testified. After rejecting Lakeside's Fifth Amendment claim, this Court rejected the Sixth Amendment claim explaining:

> "The argument is an ingenious one, but, as a matter of federal constitutional law, it falls of its own weight once the petitioner's primary argument has been rejected. In sum, if the instruction was itself constitutionally accurate, and if the giving of it over counsel's objection did not violate the Fifth and Fourteenth Amendments, then the petitioner's right to the assistance of counsel was not denied when the judge gave the instructions. To hold otherwise would mean that the constitutional right to counsel would be implicated in almost every wholly permissible ruling of a trial judge, if it is made over the objection of the defendant's lawyer." 435 U.S. at 341, 98 S.Ct. at 1096, 55 L.Ed.2d at 326.

Although there is "no right more essential than the right to the assistance of counsel" in our adversary system of criminal justice, the right has "never been

understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge." Id. This is because it is the judge, and not defense counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. Id.

In Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), the defendant argued that the state trial judge had violated his Sixth Amendment right to counsel by denying his motion for a continuance until the Deputy Public Defender originally assigned to his case was available again to him after emergency surgery. The Ninth Circuit Court of Appeals had granted Slappy federal habeas corpus relief because he had been deprived of his right to "a meaningful attorney-client relationship" without the need to demonstrate any prejudice. However, in reversing the Ninth Circuit and affirming Slappy's conviction, this Court, through Justice Burger explained:

> "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a

> defendant's Sixth Amendment right to counsel." 461 U.S. at 10, 103 S.Ct. at 1616, 75 L.Ed.2d at 619.

In the instant case, the Maryland Court of Appeals has held that the Sixth Amendment requires that a defendant in a criminal case receive the effective assistance of counsel for the co-defendant, in addition to the effective assistance of his own counsel, during the exercise of peremptory challenges. In its haste to adopt this novel interpretation, the Maryland court has confused what it does not approve with the requirements of the United States Constitution. The trial judge's order forbidding counsel from conferring with each other after they had each elected to exercise their peremptory challenges independently, did not in any way infringe on Respondent's Sixth Amendment right to the effective assistance of counsel at that stage of the trial. Judge Rasin did not forbid Respondent from conferring with his counsel regarding the exercise of his peremptory challenges. Indeed, Respondent and his

counsel together exercised 20 peremptory challenges during the jury selection process. Therefore, unlike Ferguson, Brooks, Herring, and Geders, the trial court did not prevent counsel from rendering assistance to the defendant at the trial. Moreover, the claimed interference in the instant case did not involve the adversary factfinding process.

The Maryland court held that Respondent's Sixth Amendment right was violated by the action of the trial court since it hindered his attorney in the "lawful pursuit for knowledge which might benefit the client." (Apx. 12). Judge Rasin's ruling "tied counsel's hands and foreclosed him from pursuing a valuable source of information in a consolidated trial — the co-defendant's attorney." Id. The court has overlooked Lakeside v. Oregon and Morris v. Slappy, where this Court emphasized that not every trial court order which may have interfered with the conduct of the defense or which restricts the defense in the exercise of its strategy, will amount to the deprivation of

effective assistance of counsel. This court has repeatedly emphasized that a defendant in a criminal case is only entitled to a fair trial, not a perfect one. Delaware v. Van Arsdall, 475 U.S. ___, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986); Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968).

There does not appear to be any support from federal or state case decisions for this novel interpretation of the Sixth Amendment. Other courts have followed the rationale of Lakeside v. Oregon and Morris v. Slappy. See, e.g., Berryhill v. Ricketts, 249 S.Ed.2d 197, 198 (Ga.1978), cert. denied, Berryhill v. Zant, 441 U.S. 967, 99 S.Ct. 2418, 60 L.Ed.2d 1073 (1979) (defendant not denied effective assistance of counsel or due process of law as result of trial court's denial of defense counsel's request to reserve his opening statement to jury until conclusion of State's case); United States v. Haynes, 554 F.2d 231, 234 (5th Cir.1977) (record did not support defendant's allegation

that he was denied effective assistance of counsel because trial judge hurried counsel); United States v. Panza, 612 F.2d 432, 439 (9th Cir.1980), cert. denied, Panza v. United States, 447 U.S. 925, 100 S.Ct. 3019, 65 L.Ed.2d 118 (striking defendant's testimony for refusal to answer questions on cross-examination did not violate defendant's Sixth Amendment right to counsel).

While defendants in federal capital cases have the statutory right under 18 U.S.C. §3005 to the appointment of up to two attorneys, federal and state courts have routinely rejected contentions that defendants in non-capital cases are entitled to the assistance of more than one attorney at critical stages of the trial. See, e.g., Williams v. State, 384 So.2d 1205, 1212 (Ala.Cr.App.1980) (defendant in non-capital murder case not entitled to additional counsel at trial); People v. Jackson, 28 Cal.App.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 (1980) cert. denied, 450 U.S. 1035, 101 S.Ct. 1750, 68 L.Ed.2d 232 (statute authorizing

argument by additional counsel in capital case did not authorize or mandate appointment of additional counsel at public expense, but only to permit argument of case by two counsel); Wills v. State, 253 S.E.2d 70 (Ga.1979) cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116, rehearing denied, 444 U.S. 975, 100 S.Ct. 475, 62 L.Ed.2d 393 (where defendant was represented by two counsel, trial court's order allowing only one attorney to make closing argument not a violation of Sixth Amendment); State v. Ferguson, 358 So.2d 1214, 1220-21 (La.1978) (trial court's ruling denying defense counsel's request for time to consult with public defender and to study American Bar Association standards because he and his client could not agree on defense tactics — whether to present alibi defense or no defense — did not deprive defendant of his right to counsel and due process).

In addition, the Maryland Court of Appeals has erred in its overemphasis on a defendant's need to have the assistance of his co-defendant's attorney during

the exercise of peremptory challenges. These challenges involve the "right to reject, not select, a juror." Hayes v. Missouri, 120 U.S. 68, 71, 7 S.Ct. 350, 352, 30 L.Ed. 578 (1887). Indeed, in Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), this Court explained that peremptory challenges involve "sudden impressions and unaccountable prejudices" that we are "apt to conceive upon the bare looks and gestures of another". Therefore, in a criminal trial, after the challenges for cause have been exercised, the peremptory challenges are based on unaccountable prejudices and instinctive reactions. So long as the defendant has the benefit of the assistance of his counsel in acting on prejudices and instinct, it is inconceivable why they would need the assistance of another attorney for the benefit of his or her unaccountable prejudices or instincts. This "knowledge" is not knowledge or information in its true

sense.[6] Defense counsel simply have no right to the unhindered pursuit of this "knowledge" to aid in exercising peremptory challenges if the right to exercise those challenges at all is not required by the United States Constitution.

Even if gaining this "knowledge" allows the defendant's counsel to learn counsel for the co-defendant's trial strategy with respect to the use of his peremptory strikes, this "knowledge" may not be advantageous to the defendant. Indeed, past experience suggests that sharing knowledge and strategy during the exercise of peremptory challenges in joint trials is not beneficial. See, e.g., United States v. Hueftle, 687 F.2d 1305, 1309 (10thCir.1982) (where 15 defendants in joint trial had to share 3

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[6]Obviously, if the co-defendant's attorney knew any of the prospective jurors, this would normally have been determined during the voir dire examination when the panel is asked if they know any of the lawyers. In this case, the panel was asked if they knew either of the defense attorneys. Judge Rasin refused to strike for cause a prospective juror who had been a secretary to Respondent's attorney.

peremptory challenges, none was deprived of a fair trial even though there was disagreement over who to strike from the jury); United States v. Banks, 687 F.2d 967, 976-77 (7thCir.1982), cert denied, 459 U.S. 1212, 103 S.Ct. 1208, 75 L.Ed.2d 448 (where two defendants shared five peremptory challenges no reversible error even though they disagreed over whom to remove); United States v. Williams, 463 F.2d 393, 395 (10th Cir.1972) (no reversible error where defendant wanted to remove all men and co-defendant wanted to remove all women). In McGuirk, Ingram and Wells v. State, 281 S.E.2d 283 (Ga.App.1981) four defendants were indicted separately but were subsequently joined for trial upon the state's motion. Ingram argued on appeal, that although his co-defendant's defense was not antagonistic to his, he was deprived of a fair trial because his counsel was precluded from presenting the same type of defense he would have made had he been tried separately. However, the Court of Appeals of Georgia disagreed with Ingram's claim that "his chosen

counsel was hamstrung by the strategy or trial tactics employed by co-defendant's counsel" and refused to reverse. 281 S.E.2d at 285.

Courts addressing issues involving the exercise of peremptory challenges have routinely upheld the wide discretion of the trial court. For example, Rule 24(b) of the Federal Rules of Criminal Procedure provides the number of peremptory challenges available to both the government and the defendants in federal criminal cases but does not prescribe the manner of their exercise. Therefore, "district courts have broad discretion in fashioning the method of exercising peremptory challenges, and the jury selection procedure in general." United States v. Morris, 623 F.2d 145, 151 (10th Cir.1979). Accord United States v. Durham, 587 F.2d 799 (6th Cir.1979). In multiple defendant cases, federal district judges decide whether the challenges are to be exercised jointly or separately. United States v. Franklin, 471 F.2d 1299 (5th Cir.1973); United States v. Bryant, 671

F.2d 450, 455 (11th Cir.1982). If federal judges can determine this, then state trial judges certainly have the discretion to offer co-defendants a choice in the exercise of their peremptory challenges.[7]

The opinion of the Fifth Circuit Court of Appeals in United States v. Williams, 447 F.2d 894 (5th Cir.1971), is of particular significance. The trial judge, a senior district judge from another circuit sitting by designation, employed a method of jury selection beyond the experience of the Florida lawyers in the

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[7]Petitioner recognizes that in some states co-defendants in a criminal trial may be considered as one party for the exercise of their peremptory challenges. See Doyle v. State, 415 P.2d 323 (Nev.1966); State v. Leiner, 308 A.2d 324 (R.I.1973). Obviously, in this situation, it is contemplated that the defendants and their attorneys will confer in order to decide how their collective peremptory strikes shall be exercised. Petitioner does not claim that these defendants and their attorneys cannot confer. Obviously, they must be allowed to confer. However, Petitioner maintains, that in the instant case, upon being given a choice by the trial judge, the parties had decided to exercise their challenges independently, the trial court's order preventing counsel from conferring was not a violation of either defendant's Sixth Amendment right to the effective assistance of counsel.

case. Williams argued that the trial court had erred since it used a method of jury selection which was different from the one customarily used in that federal district. In affirming Williams' conviction, the Fifth Circuit explained:

> "James Williams, while asserting that this method of impaneling a jury was prejudicial, fails to indicate the basis for such a claim. None appears from an inspection of the voluminous record. There is no suggestion that any biased, prejudiced or otherwise objectionable jurors served in the trial. It must be assumed then that all such jurors were eliminated either by peremptory challenge or by challenge for cause.
>
> James Williams here actually presents the identical unsuccessful contention made by defense counsel in Amsler v. United States, 9 Cir. 1967, 381 F.2d 37, 44, that 12 jurors should have been called and challenges exercised against the panel with replacements then called to fill the place on the panel of the excused jurors. There is no authority known to us for so limiting the discretion of trial judges in the federal system of courts. Indeed, the whole procedure outlined by Rule 24, F.R.Crim.P. emphasizes the wide discretion committed to the trial judge in the methods employed to select juries. As

> did our sister circuit in Amsler, we conclude that there is no substance in this argument.
>
> Moreover, the limitation of the five defendants to ten peremptory challenges and permitting them to be exercised separately or jointly is in direct compliance with F.R.Crim.P., Rule 24(b)...
>
> The method of jury selection employed, while strange to Florida counsel in the case, is not demonstrated to have been erroneous." Id. at 896-897.

Obviously, the Williams holding should apply to this case by analogy. Here, Judge Rasin, like the trial judge in Williams, was from another circuit, sitting by designation. Like the trial judge in Williams, Judge Rasin employed a method of jury selection which was beyond the experience of the attorneys practicing in Baltimore City. Therefore, as in Williams, so long as Judge Rasin did not abuse his discretion by denying or impairing Respondent Clark's exercise of his right to peremptory challenges, he is not entitled to a reversal of his convictions. There has been no suggestion in the instant case that any biased, prejudiced or otherwise

objectionable juror actually served on the jury which convicted Respondent. Therefore, as in Williams, it must be assumed that all such jurors were eliminated either by peremptory challenge or by challenge for cause.

In sum, the trial judge's actions were permissible. There was nothing wrong with offering the defendants a choice between exercising their peremptory challenges independently or jointly. Once the defendants had decided to exercise their challenges independently, the judge properly held them to their choice by not allowing them to "have their cake and eat it too". Even if, assuming arguendo, the trial judge was mistaken in prohibiting defense counsel from conferring, his ruling does not even approach the magnitude of constitutional error. As in Lakeside v. Oregon, the trial court's ruling was permissible. Even though it may have "interfered" with defense counsel's strategy, it did not prevent defense counsel from rendering assistance to Respondent during the exercise

of the peremptory challenges. Hence, Respondent was not deprived of his Sixth Amendment right to counsel.

II.

EVEN IF, ASSUMING ARGUENDO, THE TRIAL COURT INTERFERED WITH THE DEFENSE STRATEGY, PREJUDICE CAN NOT BE PRESUMED WHERE RESPONDENT CLARK WAS NOT PREVENTED FROM RECEIVING THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE EXERCISE OF HIS PEREMPTORY CHALLENGES.

The Maryland Court of Appeals held that Respondent did not have the burden of proving prejudice. Instead, the court held that prejudice would be presumed based upon the holdings of this Court in both Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

However, the language used in Strickland and Cronic, does not support the court's conclusion. In Strickland, this Court held that government "violates the right of effective assistance when it interferes in

certain ways with the ability of counsel to make independent decisions about how to conduct the defense." 466 U.S. at 686, 104 S.Ct. at 2064, 80 L.Ed.2d at 692. Justice O'Connor then went on to refer to this Court's four reversals, in Geders, Herring, Brooks and Ferguson.

Later in the opinion, Justice O'Connor recognized that in certain Sixth Amendment contexts, "prejudice is presumed":

> "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, [citation omitted]. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." 466 U.S. at 692, 104 S.Ct. at 2066, 80 L.Ed.2d at 696.

Moreover, such circumstances involve impairments of the Sixth Amendment right that are "easy to identify" and, for that reason and because the prosecution is directly responsible, "easy for the government to prevent." Id.

In Cronic, which also dealt with a petitioner's claim that his attorney was incompetent, this Court held that the "presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659, 104 S.Ct. at 2047, 80 L.Ed.2d at 668. In footnote 25, Justice Stevens explained that this Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Id. Justice Stevens then cited Geders, Herring, Brooks and Ferguson in addition to Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963) and Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed.2d 98 (1945), cases where the defendants were totally deprived of counsel at critical stages of their trials.

There is, of course, a considerable difference between presuming prejudice when counsel is totally absent or is prevented from assisting the accused during a critical stage of the trial and presuming prejudice when trial judges "interfere" with counsel's assistance in circumstances that are "easy to identify" and "easy for the government to prevent." In Lakeside v. Oregon, this Court emphasized that not every ruling by a trial judge that "interfered" with defense counsel's strategy was an impairment of his assistance to the defendant. Here, there was no total absence of counsel during the exercise of peremptory challenges. Instead, Respondent's counsel was present, conferred with Respondent and assisted him in the exercise of his 20 peremptory challenges. The trial court's order forbidding Respondent's counsel from conferring with the attorney for the co-defendant did not prevent him from rendering assistance at this stage. It may have kept him from gaining all the knowledge he desired, but it did not prevent him from assisting Respondent

Clark to the best of his abilities at that stage. Consquently, review by this Court is necessary in order to determine the proper standard in this situation.

Petitioner suggests that prejudice is not to be presumed unless counsel is absolutely prevented from rendering assistance such in Herring when he was not allowed to give closing argument or in Brooks when he was not allowed directly to examine the defendant. In these cases the trial court's action is tantamount to a denial of assistance at that stage of the proceeding. If, however, there is not total absence or the prevention of assistance, but a mere claim of interference, then prejudice should not be presumed. The exercise of peremptory challenges, a privilege granted under state and federal law to criminal defendants, is not an intricate part of the adversarial fact finding process. The interference here, like the interference in Lakeside v. Oregon (giving of jury instruction over defendant's objection) and Morris v. Slappy (pretrial motion for continuance until original

attorney could resume representation), did not involve the adversarial factfinding process. Therefore, in these situations, involving a claim of interference, the burden must be on the defendant to establish that he was prejudiced by the trial court's order.

III.

EVEN IF, ASSUMING ARGUENDO, THE TRIAL COURT'S INTERFERENCE IS PRESUMED PREJUDICIAL, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. The Harmless Error Analysis In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1969) applies in cases involving trial court interference with assistance of counsel.

In Chapman v. California, supra, this Court refused to hold that the denial of a federal constitutional right, no matter how unimportant, automatically results in the reversal of a conviction. This Court declined to adopt any rule that would hold all federal constitutional errors harmful regardless of the facts and circumstances.

Therefore, before a federal constitutional error can be held harmless, the reviewing court must be able to declare "a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 711. Therefore, where federal constitutional error has occurred, the State has the burden of demonstrating beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id.

In Chapman, this Court acknowledged that some constitutional rights were "so basic to a fair trial that their infraction can never be treated as harmless error". 386 U.S. at 23, 87 S.Ct. at 827-828, 17 L.Ed.2d at 70. The three examples of errors that could never be harmless either aborted the basic trial process, Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (use of coerced confession), or denied it altogether, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total denial of

counsel), Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge).

Since Chapman, this Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. ___, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). This principle has been applied to a wide variety of constitutional errors. See, e.g., Delaware v. Van Arsdall, supra (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 667 (1983) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright,

407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) (admission of confession obtained in violation of right to counsel). As this Court emphasized in Rose v. Clark, 478 U.S. __, 106 S.Ct. __, 92 L.Ed.2d 460 (1986):

> "Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term:
>
> > 'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. United States v. Nobles, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' Cf. R. Traynor, the Riddle of Harmless Error, 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.')" Delaware v. Van Arsdall, [citation omitted] 475 U.S. at ___, 106 S.Ct. at 1436-37, 92 L.Ed.2d at 470.

In Rose v. Clark, supra, this Court explained that if the defendant had counsel and was tried by an impartial adjudicator, there is a "strong presumption

that any other errors that may have occurred are subject to harmless error analysis" because "the constitution entitles a criminal defendant to a fair trial, not a perfect one." 92 L.Ed.2d at 471.

This Court has never before had occasion to decide whether or not a claim of trial court interference with the assistance of counsel is subject to the harmless error analysis. This Court suggested in Brooks v. Tennessee that the analysis would apply but declined to engage in it since the State had not raised the issue. 406 U.S. at 613, 92 S.Ct. at 1895. Review of this issue is therefore necessary.

B. The Trial Court's Ban On Communication Between Counsel During Jury Selection Was Harmless Error Beyond A Reasonable Doubt.

The only complaint which Respondent Clark has ever made on appeal from his conviction for possession of heroin is that the trial court erred in preventing his counsel from conferring with his co-defendant's counsel during the exercise of peremptory challenges. Indeed, Respondent Clark has never alleged that the jury which convicted him was not impartial.[8] There has been no allegation that the trial court erred in denying severance or that co-defendant Hemphill struck any prospective juror that Respondent wanted on the jury. There has been no allegation that the trial court erred by refusing to strike for cause a prospective juror requested by Respondent so that he had to use a peremptory challenge to strike that person. There has been no allegation that the trial

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[8]It is interesting to note that the jury only convicted Respondent of one of the four counts.

court erred with regard to the order that peremptory challenges were exercised or the manner in which they were exercised. There has been no allegation that Respondent was prevented or impaired in any way from striking any panel member.

Indeed, the contention made by Respondent's counsel why he did not want to pool his 20 peremptory challenges with co-defendant Hemphill makes little sense. Although it is true that either defendant would have had to exhaust his peremptory challenges in order to preserve for appellate review a contention that the trial court erred in refusing to strike for cause a prospective juror requested by either of the defendants, that did not happen in this case. The defendants both requested that prospective juror #228 be striken for cause and the trial court complied. At this point, there was no reason for defense counsel not to pool the challenges together since there was no objection to preserve for appeal. Although defense counsel objected to one of the State's requested

challenges for cause, there was no requirement under Maryland law that they exercise all of their peremptory strikes in order to preserve that objection for appellate review. In addition, Respondent did not even provide the appellate courts of Maryland with a transcript of his trial, as he merely included in the record on appeal that portion which dealt with the pretrial motions and jury selection. There has been not a shred of evidence produced, let alone an allegation, that the trial court's order prejudiced Respondent's right to a fair trial in any manner.

In light of this, the Maryland Court of Appeals' finding that the trial judge's proscription upon communication also placed an "impediment upon counsel's judgment in determining whether to object to the State's jury challenges" in light of this Court's decision in Batson v. Kentucky, supra, is nothing short of amazing. Respondent has never alleged that he was a member of a cognizable racial group or that Hemphill was. He never alleged that the State of

Maryland routinely struck members of any such cognizable racial group from the juries generally or that the States did so in the instant case.

Even if, assuming arguendo, the State had struck members of a cognizable racial group with its peremptory challenges, there has been no showing that no members of that racial group were served on the jury. There has been no allegation of any impropriety in this regard at all. Even if the State had tried to improperly exercise peremptory strikes, for whatever reason, it strains credulity to state that counsel for Respondent needed to confer with counsel for the co-defendant in order to decide whether to object to the State's use of such strikes. This contention has nothing to do with trial strategy. The following quotation from this Court's opinion in Morris v. Slappy, seems especially fitting:

> "Over 75 years ago, Roscoe Pound condemed American courts for ignoring 'substantive law and justice,' and treating trials as sporting contests in which the 'inquiry is, Have the rules of the game been carried out strictly?'

> Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Ann.Rep. 395, 406 (1906). A criminal trial is not a 'game,' and nothing in the record of Respondent's two trials gives any support for the conclusion that he was constitutionally entitled to a new trial." 461 U.S. at 15, 103 S.Ct. at 1618, 75 L.Ed.2d at 622.

In sum, further review by this Court of the federal harmless error issue is necessary. The trial in this case was not a game. Respondent was found guilty by an impartial jury (he has not alleged otherwise) of a serious narcotics offense. If it can be said, beyond a reasonable doubt, that the trial court's ruling did not affect the verdict, the conviction should be affirmed.

CONCLUSION

Review by this Court is necessary to correct the erroneous interpretation of the Sixth Amendment right to effective assistance of counsel by the Maryland Court of Appeals. Contrary to this Court's previous holdings, the Maryland Court found that a trial court restriction on defense counsel's strategy during the exercise of peremptory challenges

amounted to constitutional error. Review is also necessary because the Maryland court presumed prejudice but did not engage in a harmless error analysis. For the foregoing reasons, Petitioner requests this Court to issue a Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

STEPHEN H. SACHS,
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ANN E. SINGLETON,
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APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 145

SEPTEMBER TERM, 1984

STEVEN LAMONT CLARK

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Opinion by Cole, J.

Filed: June 26, 1986

We granted certiorari in this case to determine whether a trial judge may forbid communication between counsel for co-defendants regarding matters of trial strategy.

The parties have agreed to the following facts. Appellant, Steven Lamont Clark, and his co-defendant, Jonathan Hemphill, were indicted by a Baltimore City Grand Jury for various narcotic-related offenses. Prior to trial, both defendants moved for severance, and the trial court denied both motions. During the voir dire examination of prospective jurors, the trial judge asked defense counsel whether they wanted to pool their peremptory challenges or exercise them individually. The following colloquy occurred:

> MR. KARCESKI [counsel for Hemphill]: We each have 20

challenges.[1] I am only saying I don't want to do anything at this point to upset the system or to cause an unnecessary delay, but if we are going to have a problem, I just don't know whether we take a chance and go with it now or hope it works out. If it doesn't and we come up short, I think

1/Former Maryland Rule 753(a)(1) provided that where the defendant was subject to a sentence of death, life imprisonment or twenty years or more of imprisonment, each defendant was permitted twenty peremptory challenges. Both defendants sub judice were subject to more than twenty years imprisonment, and thus both qualified for the twenty challenges. Former Rule 753 implemented Md. Code (1980) Repl. Vol.), § 8-301 of the Courts and Judicial Proceedings Article. In 1984, with the adoption by this Court of the new Maryland Rules, Rule 753 was replaced by Rule 4-313. In 1986, the legislature repealed and reenacted § 8-301 of the Courts Article. 1986 Md. Laws ch. 656. Effective July 1, 1986, § 8-301 provides that where the defendant is subject to death, because notice of intention to seek a death sentence has been filed, and where the defendant is subject to life imprisonment, each defendant is permitted twenty peremptory challenges and the State is permitted ten for each defendant. § 8-301(a) & (b). Where the defendant is subject to a sentence of twenty years or more, however, each defendant is permitted ten peremptory challenges and the State is permitted 5 for each defendant, except where the defendant is charged with a common law offense for which no penalty is provided by statute. § 8-301(c). In all other cases, each party is permitted four peremptory challenges. § 8-301(d).

the court is well aware under [Dean v. State, 46 Md. App. 536, 420 A.2d 288 (1980)], we have created a tremendous monster and the only way to rectify it is to begin again. I don't want to commit myself, and I know the court is not asking us to do it, but I don't want to commit myself to a certain number of challenges. We have 20, and I will do the best I can under the situation.

THE COURT: Okay. I will ask each defendant's attorney to exercise his challenges and I will keep score on it. I just asked, are you going to consult with one another and pool and have 40 between you or each one exercise independently?

MR. KARCESKI: I think we will exercise our independent right to challenge.

THE COURT: Then don't confer with one another during the selection. Do it independently. You cannot.

MR. KARCESKI: I don't think there is anything that forbids us from speaking —

THE COURT: I am instructing you, you get 20 challenges, and you get 20 challenges. Let's not play this game of saying you will exercise it independently, but yet you want to confer on it.

> MR. KARCESKI: I note my objection. I will note my inability to comment on the court's ruling at this point.
>
> THE COURT: Go ahead.
>
> MR. LYONS: [Counsel for Clark]: I take exception to it.

Later during the course of the juror examination, defense counsel again complained that they had not been allowed to confer with each other:

> THE COURT: This is the first time I have been in trial where the defense counsel haven't agreed to — perfectly all right to confer together but you all don't want to do that. I don't see what difference it makes. You had 20 challenges, and you could confer. It doesn't make any difference whether he takes 30 and you take 10 or not. You each insisted on the 20, and if you do that, you will bite the spike —
>
> MR. KARCESKI: Your Honor —
>
> THE COURT: I am not going to argue about it.
>
> MR. KARCESKI: The reason why I take 20 or we pool it, if I exhaust my challenges, I may have certain remedies in the appellate court that I don't have if I don't exhaust all my challenges. So, suppose we took 38, who are we to say we exhausted the

> challenges when it comes to whatever argument is left, and if the court rules, I think we did make an exception early on about a challenge for cause — maybe something else that escapes me for the moment. So, I think each defendant is entitled to 20, and that is why I requested it on behalf of Mr. Hemphill. And I continue my request for mistrial, Your Honor.
>
> THE COURT: I will deny your request, both of you.

The jury was selected,[2] and appellant was tried and convicted of possession of heroin. The court imposed a sentence of three years imprisonment, all but one year suspended, and three years supervised probation to commence upon release. Clark appealed to the Court of Special Appeals and raised the sole issue of whether the court erred in refusing to allow counsel for Clark and for his co-defendant to confer. The intermediate court, in an unreported per curiam

[2/] Contrary to the opinion of the Court of Special Appeals, the record discloses that each defendant exhausted his twenty peremptory strikes, while the State only used eight peremptory strikes.

opinion, affirmed the trial court's judgment. We issued our writ of certiorari to consider the important question presented.

Appellant contends that fundamental fairness and due process dictate that co-defendants who have been forced to accept the disadvantage of a joint trial may not be deprived of one of its few benefits — consultation between counsel for co-defendants on matters of trial strategy. He argues that the manner in which peremptory challenges are exercised is an important trial strategy, which is grounded in the "unfettered" right of the defendant to his peremptory challenges. The State rejoins that because there was no statute or court rule which prohibited the trial court's conduct; the court acted within its sound discretion. The State also maintains that appellant's right to exercise his peremptory challenges was not impaired so as to deny him a fair trial.

In State v. Tichnell, No. 52, slip op. at 13 (1986), we said,

> Under the Sixth Amendment to the Constitution of the United States the accused in all criminal cases is entitled "to have the Assistance of Counsel for his defense." Argersinger v. Hamlin, 407 U.S. 25, 27, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 339, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963). There is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights which declares " 'That in all criminal prosecutions, every man hath a right. . . to be allowed counsel. . . .' " Harris v. State, 303 Md. 685, 695 n.3, 496 A.2d 1074 (1985).
>
> In McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970), the Supreme Court said "that the right to counsel is the right to the effective assistance of counsel."

Our analysis in Tichnell was based upon the charge that counsel's performance did not measure up to the proper standard of effective representation. In the case before us today, however, we are concerned with restrictions imposed by the court which are alleged to impede counsel in his effort to effectively assist the defendant. As the Supreme Court stated in Herring v.

New York, 422 U.S. 853, 857-58, 95 S. Ct. 2550, 2553, 45 L. Ed. 593, 598 (1975):

> The right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradition of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments . . . . The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.

A fundamental characteristic of our system of justice is the guarantee that neither the court nor the state will impede counsel in his efforts to render effective assistance to the defendant. The Supreme Court has pointed out on numerous occasions that where counsel's effectiveness is impaired by action of the court or the state placing a marked restraint upon counsel's tactical or strategic judgment, the defendant's right to assistance of counsel has been violated. In Herring, supra, for example, the Court,

recognizing that "closing argument is a basic element of the adversary process in criminal trials," held that a statute which denies such argument violates the sixth amendment right to assistance of counsel. 422 U.S. at 858, 95 S. Ct. at 2553, 45 L. Ed. at 598. See also Yopps v. State, 228 Md. 204, 178 A.2d 879 (1962). In Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed.2d 592 (1976), the Court held that where a defendant was deprived of his right to consult with his counsel during an overnight recess, defendant was denied his right to effective assistance of counsel. See generally Annot., 5 A.L.R. 3d 1360 (1966) (discussing state court decisions on scope of accused's right to communicate with his attorney). In Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed.2d 358 (1972), the Supreme Court held that a Tennessee statute which required that a defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case" was in

violation of the sixth amendment right to the assistance of counsel. The Court stated that:

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make the choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense — particularly counsel — in the planning of its case.

Id. at 612, 92 S. Ct. at 1895, 32 L. Ed.2d at 364. See also Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961) (holding that a statute which allowed a defendant to make an unsworn statement to the jury, but denied counsel the right to question the witness on direct examination denied the defendant the right to assistance of counsel). Justice O'Connor recounted the principle set forth by these cases in Strickland v. Washington, supra, where she stated, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to

conduct the defense." 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed.2d at 692.

We believe that in this case, the defendant's right to effective assistance of counsel was violated by the action of the trial court. As we see it, effective representation means representation in which the attorney is unhindered in the lawful pursuit for knowledge which might benefit the client. The trial judge's ruling here in effect tied counsel's hands and foreclosed him from pursuing a valuable source of information in a consolidated trial — the co-defendant's attorney. The State disagrees, arguing that the defendant has no right to the effective assistance of his co-defendant's counsel. The point is, however, that the trial judge's action adversely impacted upon the effectiveness of the defendant's attorney by placing an impediment on his assistance.

Moreover, in a joint trial, counsel must be permitted to coordinate his defense with co-counsel. If not, the attorneys are forced to work blindly of each

other, and they may find themselves working at cross-purposes. Thus, the court's denial of communication thwarts the effective assistance of counsel.

In the case at bar, however, the proscription upon communication went further than merely stymieing the defendant's attorney's judgment as to a trial strategy; it impaired counsel's ability to make a considered judgment as to when to exercise the defendant's peremptory challenges. A peremptory challenge, as its name denotes, is a final, unquestioned challenge to a prospective juror. Although the Supreme Court recently held in Batson v. Kentucky, __ U.S. __, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) that the peremptory challenge is not "peremptory" where there is a prima facie showing that the prosecution has used the challenge for purposeful discrimination on the basis of race, the Court nevertheless recognized that the peremptory challenge remains an important part of our system of justice. Id. at __, 106 S. Ct. at __, 90 L. Ed.2d at __.

The trial judge's action in this case clearly impaired that right by imposing the restriction upon the defendant's counsel. Although one attorney might have been aware of sound reasons to strike a particular juror, those reasons might have become much less sound when viewed in light of co-counsel's trial strategy. Thus, when the trial judge forbade counsel to communicate, he deprived counsel of valuable information and advice concerning the exercise of the peremptory challenges.

Conversely, the judge's proscription upon communication also placed an impediment upon counsel's judgment in determining whether to object to the State's jury challenges. This error becomes especially acute in light of the Supreme Court's decision in Batson, supra. In Batson, the Court held that a defendant may establish a prima facie case of purposeful discrimination by the prosecution in its exercise of peremptory challenges where the defendant shows that he is a member of a cognizable

racial group and that the prosecution has used its peremptories to exclude members of the defendant's race.[3] __ U.S. at __, 106 S. Ct. at 1772-23, 90 L. Ed.2d at ____ (overruling in part Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed.2d 759 (1965)). Where the trial judge disallows communication between the co-

[3]/In Batson v. Kentucky, supra, the Supreme Court set forth that among the relevant circumstances the trial court may consider in the determination of whether the defendant has made a prima facie case of discrimination are a "pattern" of strikes against jurors of the defendant's race in the particular venire, as well as questions and statements by the prosecution during the voir dire which support the inference of discrimination. "Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors." ___U.S. at ____, 106 S. Ct. at 1723, 90 L. Ed.2d at __.

The Batson Court noted that it expressed no view as to whether the limitation applies to the exercise of peremptories by defense counsel. Id. at _____, n.12, 106 S.Ct. at 1719, n.12, 90 L. Ed.2d at ____, n.12. The effect of the Batson opinion was to reject the portion of Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed.2d 759 (1965), which set forth that the defendant may not make a prima facie showing of a violation of the equal protection clause by solely demonstrating the prosecution's purposeful racial discrimination in the defendant's case.

defendant's attorneys during voir dire, clearly the efficacy with which counsel may identify and object to invidious strikes is impaired. Co-defendants must be allowed to confer as to this aspect of the case.

In spite of these violations of defendant's rights, the State argues that appellant has failed to show that he has been actually prejudiced by the trial judge's action. We do not believe that appellant has the burden of proving prejudice, however. The Supreme Court has stated that where the state deprives the defendant of effective assistance of counsel, constitutional error will be found without the showing of prejudice. United States v. Cronic, 466 U.S. 648, 668 & n.25, 104 S. Ct. 2039, 2047 & n.25, 80 L. Ed.2d 657,668 & n.25 (1984); cf. Strickland v. Washington, supra (where the Court held that the petitioner is required to show prejudice where asserting ineffective assistance of counsel claim; the Supreme Court also recognized in Strickland, 466 U.S. at 692,104 S. Ct. at 2067, 80 L. Ed.2d at 686, however, that there is no

requirement to show prejudice when asserting state interference with assistance of counsel).

Of course, the prosecution, following proper procedure, may show that the prejudice to the defendant was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 22-24, 87 S. Ct. 824, 827-28, 17 L. Ed.2d 705, 709-10 (1969). Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976). In the case before us, however, the State has failed to file a cross-petition alleging harmless error as an issue. We have repeatedly stated that under Maryland Rule 813, where the issue of harmless error is not encompassed within the petition for certiorari or in a cross petition, we will not consider it. Warrick v. State, 302 Md. 162, 175 n.6, 486 A.2d 189, 195 n.6 (1985); Coleman v. State, 281 Md. 538, 547, 380 A.2d 49, 55 (1977); Dempsey v. State, 277 Md. 134, 142, 355 A.2d 455, 459 (1976).

Accordingly, we shall reverse.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND REMAND FOR A NEW TRIAL. BALTIMORE CITY TO PAY THE COSTS.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1701

September Term, 1983

STEVEN LAMONT CLARK

v.

STATE OF MARYLAND

Liss
Wilner
Bell,

JJ.

PER CURIAM

FILED: October 11, 1984

Appellant Steven Clark was convicted by a jury in the Circuit Court for Baltimore City of one count of possession of heroin. He was sentenced to three years to the Division of Correction with all but one year suspended, placed on three years supervised probation, and was fined five hundred dollars. The sole issue on appeal is whether the court erred in refusing to allow counsel for Clark and a co-defendant to consult each other during the exercise of their peremptory challenges thereby denying appellant due process of law. We hold the court did not err. We affirm.

Clark and his co-defendant, Jonathan Hemphill, were indicted for various narcotics-related offenses. Motions for severence [sic] filed by both were denied.

Pursuant to Md. Rule 753(a)(1), each defendant who is subject on any single count to a sentence of death, life imprisonment or imprisonment for twenty years or more is permitted twenty peremptory challenges. The State is allowed ten peremptory

challenges for each defendant.[1] The trial judge offered counsel for the two defendants a choice. They could either exercise their twenty peremptory challenges independently, or they could combine their forty challenges and exercise them jointly. For tactical reasons, counsel for Hemphill chose to exercise his challenges independently. The trial judge then instructed defense counsel not to confer on the challenges. Both attorneys took exception to the judge's order forbidding consultation on the peremptory challenges. It is only this particular instruction forbidding consultation that appellant contests on appeal.

Appellant asserts that the court's direction denying defense counsel the opportunity to consult each other impaired his right to challenge. This was clearly not the case. The trial judge gave counsel the opportunity to pool their challenges and consult

[1]Rule 753(a)(1) is substantively unchanged by the revised Rule 4-313(a)(2), which took effect July 1, 1984.

regarding the total forty challenges. Counsel chose the tactical alternative of independently challenging jury panelists. Counsel for Clark excepted to the court's ruling, but made no issue of the fact that the decision by Hemphill's counsel deprived him of a choice. They wanted to ensure that they individually took twenty strikes to preserve the record for appellate review. There is no showing by appellant of prejudice. We cannot tell from the record whether each defendant actually used all of his twenty challenges.

The United States Supreme Court in Swain v. Alabama, 380 U.S. 202 (1965), recognized the value of the peremptory challenge. In discussing the essential fairness of the criminal defendant's right to make peremptory challenges, the Court stated "[t]he denial or impairment of the right is reversible error without a showing of prejudice." Id. at 219. Appellant's right to exercise his twenty peremptory challenges was not denied or impaired. His assertion that the order

prohibiting communication between his counsel and his co-defendant's attorney violated his constitutional due process rights is wholly without merit. Judge Lowe, speaking for this court in Hall v. State, 22 Md. App. 240, 243 (1974), stated

> that there is nothing in the Constitution of the United States (or of Maryland for that matter) which requires the granting of peremptory challenges. It is a privilege granted by legislative authority which must be taken with the limitations placed upon the manner of its exercise

The trial court has broad discretion in presenting to the parties the method by which they may exercise their peremptory challenges. There is only one aspect of the process where the court has no discretion. When the defendant requests to alternate his peremptory strikes with the state's attorney, this must be granted. Herd v. State, 25 Md. App. 284 (1975); Rule 753(b)(2). This aspect, however, is not at issue here. The option offered to appellant by the trial court to exercise his challenges independently or pool them with his co-defendant is not prescribed in Rule

753. The court within its discretion offered appellant alternatives. The court offered appellant a choice and held him to that choice. We will not allow appellant "to have his cake and eat it too." This Court, in Walker v. Hall, 34 Md. App. 571 (1977), resolved a similar due process claim regarding peremptory challenges in a civil suit. There, in a tort action for negligence, the appellant was allotted fewer peremptory challenges than her multiple adversaries. The Court opined

> [I]n support of her assertion of unequal treatment, appellant cites no concrete element of prejudice in the jury selection process. Specifically, no record was made by her below with respect to any panel member or members whom she was prevented from striking. Indeed, there is nothing before us to indicate the extent to which the peremptory strikes of any of the parties were exercised. In this state of the record, appellant's bald assertion that her constitutional rights were violated must be rejected.

Walker v. Hall, supra, 34 Md. App. 571, 590-591. As in Walker, appellant Clark fails to point us to any impair-

ment of his rights that he sustained at trial that were prejudicial.

We agree with appellant that the right to make peremptory challenges is an important right. We hold, however, that he was not denied the exercise of that right. The court did not err.

JUDGMENT AFFIRMED

COSTS TO BE PAID BY APPELLANT.

STEVEN LAMONT CLARK	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	No. 145
STATE OF MARYLAND	*	September Term, 1984

* * * * * * *

MANDATE

TO THE HONORABLE THE JUDGES OF THE
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of Steven Lamont Clark v. State of Maryland came before you and wherein the judgment of the said Court of Special Appeals was duly entered on the eleventh day of October, 1984 as appears from the transcript of the record of the said Court of Special Appeals which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated February 7, 1985; and

WHEREAS in the September Term, 1984 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 26, 1986 by this Court that the judgment of the Court of Special Appeals be reversed and case remanded to that Court to reverse the judgment of the Circuit Court for Baltimore City and remand for a new trial. Baltimore City to pay the costs.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland, this twenty-first day of August, 1986.

Alexander L. Cummings /s/
Clerk
Court of Appeals of Maryland

July 28, 1986: Motion for reconsideration filed by appellee.

August 21, 1986: Motion for reconsideration denied.

Costs:

Appellant brief	$100.80
Appellee brief	72.00
Motion for Reconsideration	25.00

STATUTE

Maryland Code, Courts and Judicial Proceedings,

Section 8-301. Peremptory Challenges

(a) Cases involving death, life imprisonment, or 20 years or more. — In a trial in which the defendant is subject, on any single count, to a sentence of death, life imprisonment, or 20 years or more of imprisonment, except for common law offenses for which no specific penalty is provided by statute, each defendant is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant.

(b) Other cases. — In all other cases, each party is permitted four peremptory challenges; all defendants are considered a single party for this purpose.

(1) If it appears that the trial involves two or more defendants

having adverse or hostile interest, the court may allow additional peremptory challenges;

(2) No defendant shall be allowed more than four peremptory challenges.

(c) Clerk to furnish sufficient number of names. The clerk of the court shall provide a sufficient number of prospective jurors to allow the parties to exercise the peremptory challenges permitted by this section of the Maryland Rules.

RULES

Maryland Rule 4-313. Peremptory Challenges

(a) Number. —

(1) Generally. — Except as otherwise provided by this section, each party is permitted four peremptory challenges. For purposes of this subsection, multiple defendants shall be considered as a single party unless the court determines that adverse or hostile interests between defendants justify allowing to each of them separate peremptory challenges, not to exceed four for each defendant.

(2) Cases Involving Death or Imprisonment for 20 Years or More. — Each defendant who is subject on any single count to a sentence of death,

life imprisonment, or imprisonment for 20 years or more, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant.

(3) Alternate Jurors. — For each alternate juror to be selected, the State is permitted one additional peremptory challenge for each defendant and each defendant is permitted two additional peremptory challenges. The additional peremptory challenges may be used only against alternate jurors, and other peremptory challenges allowed by this section may not be used against alternate jurors.

(b) Exercise of Challenges. —

(1) By Alternating Challenges. — On request of any party for alternate challenges, the clerk shall call each juror individually in the order previously designated by the court. When the first juror is called, the State shall indicate first whether that juror is challenged or accepted. When the second juror is called, the defendant shall indicate first whether that juror is challenged or accepted. When the third juror is called, the State shall again indicate first whether that juror is challenged or accepted, and the selection of a jury shall continue with challenges being

exercised alternately in this fashion until the jury has been selected.

(2) By Simultaneous Striking From a List. — If no request is made for alternating challenges, each party shall exercise its challenges simultaneously by striking names from a copy of the jury list.

(3) Remaining Challenges. — After the required number of jurors has been called, a party may exercise any remaining peremptory challenges to which the party is entitled at any time before the jury is sworn, except that no challenge to the first 12 jurors shall be permitted after the first alternate juror is called.

Former Maryland Rule 753. Peremptory Challenges

a. Number.

1. Cases Involving Death, or Imprisonment for Life or Twenty Years or More.

In a trial in which the defendant is subject, on any single count, to a sentence of death, life imprisonment or twenty years or more of imprisonment, except for common law offenses for which no specific penalty is provided by statute, each defendant is permitted twenty peremptory challenges and the State is permitted ten peremptory challenges for each defendant.

2. Other Offenses.

In all other cases, each party is permitted four peremptory challenges. Multiple defendants are considered a single party for purpose of this subsection. It if appears that two or more defendants have adverse interests, the court may permit each defendant additional peremptory challenges, not to exceed four for each defendant.

3. Alternate Jurors.

For each alternate juror to be selected, the State is permitted one additional peremptory challenge for each defendant and each defendant is permitted two additional peremptory challenges. The additional peremptory challenges may be used only against alternate jurors, and other peremptory challenges allowed by this Rule may not be used against alternate jurors.

b. Exercise of Challenges.

1. Notice by the Court.

Prior to the exercise of challenges, the court shall inform the parties of the order in which the jurors' names will be called from the jury list.

2. Alternating Challenges.

Upon the request by any party for alternating challenges, the clerk shall call each juror individually in the order previously announced by the court. When the first juror is called, the State shall indicate first whether that juror is challenged or accepted. When the second juror is called, the defendant shall indicate first whether the juror is challenged or accepted. When the third juror is called, the State shall again indicate first whether that juror is challenged or accepted and the selection of a jury shall continue with challenges being exercised alternately in this fashion until the jury has been selected.

3. Striking From a List.

If no request is made for alternating challenges, each party shall exercise its challenges simultaneously by striking names from a copy of the jury list. The clerk shall then call the jurors who have not been challenged in the order previously announced by the Court.

4. Remaining Challenges.

After the required number has been called, a party may exercise any remaining peremptory challenges to which he is entitled at any time before the jury is sworn.